

EXHIBIT

4

In The Matter Of:

MICROSOFT CORPORATION

v.

MOTOROLA, INC., et al.

RICHARD J. HOLLEMAN - Vol. 1

August 21, 2012

MERRILL CORPORATION

LegalLink, Inc.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

VIDEOTAPED DEPOSITION OF RICHARD J. HOLLEMAN

8:56 a.m.

Reported By: Joan V. Cain

RICHARD J. HOLLEMAN - 8/21/2012

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<p>1 Videotaped Deposition of RICHARD J. HOLLEMAN, 2 held at the law offices of: 3 4 SIDLEY AUSTIN, LLP 5 1501 K Street, Northwest 6 Washington, D.C. 20005 7 (202) 736-8000 8 9 Pursuant to Notice, before Joan V. Cain, Court 10 Reporter and Notary Public in and for the District of 11 Columbia. 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 CONTENTS 2 3 EXAMINATION OF RICHARD J. HOLLEMAN PAGE 4 By Mr. Wyland 6 5 6 EXHIBITS 7 (Attached to the Transcript.) 8 PX DEPOSITION EXHIBITS PAGE 9 EXHIBIT 213 Rebuttal Expert Report of 7 10 Mr. Holleman, 8/10/12 11 EXHIBIT 214 Letter of Assurance 18 12 EXHIBIT 215 Patent Statement and Licensing 22 13 Declaration Form 14 EXHIBIT 216 IEEE Standards Association 28 15 Patent Policy 16 EXHIBIT 217 Common Patent Policy for the 28 17 ITU-T, ITU-R, ISO, and IEC 18 19 20 21 22 23 24 25</p>
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<p>1 APPEARANCES 2 3 ON BEHALF OF PLAINTIFF: 4 NEIL H. WYLAND, ESQUIRE 5 SIDLEY AUSTIN, LLP 6 One South Dearborn 7 Chicago, Illinois 60603 8 Telephone: (312) 853-7000 9 E-mail: nwyland@sidley.com 10 11 ON BEHALF OF DEFENDANTS: 12 MATTHEW J. RIZZOLO, ESQUIRE 13 ROPES & GRAY, LLP 14 Suite 900 15 700 12th Street, Northwest 16 Washington, D.C. 20005-3948 17 Telephone: (202) 508-4600 18 E-mail: matthew.rizzolo@ropesgray.com 19 20 ALSO PRESENT: 21 Terry Michael King 22 23 24 25</p>	<p>08:56:33 1 PROCEEDINGS 08:56:33 2 THE VIDEOGRAPHER: Here begins Videotape No. 08:56:35 3 1 in the deposition of Richard Holleman in the matter 08:56:40 4 of Microsoft Corporation versus Motorola, 08:56:43 5 Incorporated, et al., in the U.S. District Court for 08:56:45 6 the Western District of Washington, Case No. 08:56:55 7 2:10-cv-01823. 08:56:55 8 Today's date is August 21st, 2012. The time 08:56:59 9 on the video monitor is 8:57 a.m. The video operator 08:57:04 10 today is Terry Michael King of Merrill Legal 08:57:06 11 Solutions. This video deposition is taking place at 08:57:10 12 Sidley Austin, LLP, 1501 K Street, Northwest, 08:57:15 13 Washington, D.C. 08:57:15 14 Counsel, please voice identify yourselves 08:57:18 15 and state who you represent. 08:57:19 16 MR. WYLAND: Neil Wyland on behalf of the 08:57:22 17 plaintiff Microsoft Corporation. 08:57:24 18 MR. RIZZOLO: Matt Rizzolo, Ropes & Gray on 08:57:28 19 behalf of Motorola. 08:57:28 20 THE VIDEOGRAPHER: The court reporter today 08:57:29 21 is Joan Cain on behalf of Merrill Legal Solutions. 08:57:32 22 Would the reporter please swear in the witness. 08:57:32 23 RICHARD J. HOLLEMAN 08:57:32 24 having been duly sworn, was examined and did testify 08:57:44 25 as follows:</p>

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08:57:45	1	EXAMINATION BY COUNSEL FOR PLAINTIFF	08:59:35	1	A Attachment B is a list of documents that I
08:57:45	2	BY MR. WYLAND:	08:59:43	2	have considered in preparation of my report.
08:57:45	3	Q Good morning.	08:59:45	3	Q Does this expert report express your
08:57:46	4	A Good morning.	08:59:47	4	opinions relating to this matter?
08:57:46	5	Q Could you state your full name and address	08:59:49	5	A Yes, it does.
08:57:48	6	for the record.	08:59:50	6	Q Is there anything wrong in your report?
08:57:50	7	A My name is Richard Joseph Holleman. My	08:59:54	7	A Not that I'm aware of, no.
08:57:54	8	address is 2600 Southeast Ocean Boulevard, Apartment N	08:59:56	8	Q Okay. So there are no errors that you're
08:58:01	9	15, Stuart, Florida.	08:59:58	9	aware of in your report?
08:58:03	10	Q And, Mr. Holleman, you've had your	08:59:59	10	A None that I would bring forward, no.
08:58:06	11	deposition taken several times before, correct?	09:00:00	11	Q Okay. Let's first identify your -- your
08:58:09	12	A Yes, I have.	09:00:05	12	areas of expertise. How would you describe your area
08:58:10	13	Q And so you're generally familiar with the	09:00:08	13	of expertise?
08:58:12	14	procedures?	09:00:12	14	A I have more than 30 years' experience in
08:58:12	15	A Yes, I am.	09:00:20	15	industry standards development activities and also as
08:58:12	16	Q Just a couple of reminders. One, try to	09:00:26	16	those activities relate to the use of patented
08:58:15	17	keep our voices up so that the court reporter can take	09:00:29	17	material in standards development, primarily through
08:58:18	18	down what we're saying, and if you will wait till I	09:00:34	18	my employment at IBM and subsequently through my
08:58:22	19	finish the question before answering it, I will try to	09:00:40	19	consulting activities. So I would say my expertise is
08:58:25	20	wait till the end of your answer before I ask another	09:00:44	20	in the area of SSOs so-called, also known as SDOs and
08:58:28	21	question.	09:00:56	21	their related standards activities and policies
08:58:28	22	A Agreed.	09:00:59	22	relating to the use of patents in standards.
08:58:28	23	Q Any other questions before we get started?	09:01:05	23	Q Let's define SSO since you used that term
08:58:31	24	A No. I'm fine.	09:01:09	24	and probably will be using that term today. From your
08:58:32	25	Q Are you on any medication or under any	09:01:13	25	report, I understand that that means standards setting
Page 7			Page 9		
08:58:35	1	condition that would affect your ability to testify	09:01:16	1	organizations?
08:58:37	2	today?	09:01:18	2	A Yes, standard setting organizations, and I
08:58:38	3	A No, I'm not.	09:01:21	3	think, as I said, also often referred to as SDOs,
08:58:38	4	Q I -- I understand you're testifying today as	09:01:25	4	standards developing organizations.
08:58:40	5	an expert for the defendants in this case, Motorola	09:01:27	5	Q And so if we use either of those terms
08:58:43	6	and related companies?	09:01:30	6	today, can we understand that they can be used
08:58:44	7	A Yes, that's correct.	09:01:32	7	interchangeably?
08:58:47	8	MR. WYLAND: I'd like to introduce our first	09:01:33	8	A Yes, we can.
08:58:50	9	exhibit, which has been marked PX 13 -- oh, I'm	09:01:34	9	Q Do you have a preference for using one term
08:58:57	10	sorry -- 213.	09:01:36	10	over the other?
08:58:59	11	(PX Deposition Exhibit 213 was marked	09:01:37	11	A My personal preference is SDO, but almost
08:58:59	12	for identification and was attached to the deposition	09:01:42	12	all of the documents are now using SSO.
08:59:00	13	transcript.)	09:01:46	13	Q And another term that we see in your expert
08:59:07	14	BY MR. WYLAND:	09:01:54	14	report and perhaps elsewhere is a term called LOA, and
08:59:07	15	Q Sir, is this the expert report that you've	09:01:59	15	what is that?
08:59:09	16	submitted in this case?	09:01:59	16	A LOA is a term, acronym for Letter of
08:59:10	17	A Yes. It appears to be a copy of my rebuttal	09:02:09	17	Assurance. This came primarily from the IEEE
08:59:13	18	expert report.	09:02:14	18	standards organization, which is a letter that is
08:59:14	19	Q All right. And that's your signature on the	09:02:22	19	requested relative to patents that may be essential to
08:59:15	20	first page?	09:02:25	20	a standard. Generally, it is used in here also in the
08:59:16	21	A Yes, it is.	09:02:31	21	context of the ITU, International Telecommunications
08:59:18	22	Q And there are two attachments I believe to	09:02:37	22	Union. While they do not specifically call it an LOA,
08:59:20	23	this report. The first, A, what is that?	09:02:41	23	they refer to it as a statement, licensing statement.
08:59:28	24	A That's my summary of my CV.	09:02:48	24	It's, in effect, the same kind of document. So for
08:59:34	25	Q And what is Attachment B?	09:02:54	25	convenience, I've referred to it here as LOA.

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09:02:58	1 Q Okay. And so the ITU, since you've	09:05:45	1 regarding the legal effects of the Letters of
09:03:00	2 identified that, that is a standards setting	09:05:48	2 Assurances?
09:03:04	3 organization that has -- has promulgated the H.264	09:05:48	3 A That's correct.
09:03:12	4 standard; is that correct?	09:05:56	4 Q Just so we're clear, you said that you use
09:03:13	5 A Yes, through one of their suborganizations,	09:05:59	5 the term letters of assurance interchangeably for the
09:03:18	6 that's the ITU-T. This whole activity is fraught with	09:06:02	6 IEEE form and the ITU form, and if we use letters of
09:03:22	7 acronyms. So that would be the telecommunications	09:06:08	7 assurance or LOA here today, we can understand that
09:03:28	8 sector of the ITU. There's also a radio	09:06:12	8 that's just regarding those declaration forms or
09:03:31	9 communications sector that develops radio	09:06:17	9 assurance forms generally, correct?
09:03:34	10 communication standards, and there is an ITUD, which	09:06:18	10 A Yes, that's correct.
09:03:39	11 is for developing countries that are interested in	09:06:25	11 Q Do you have any personal experience in
09:03:42	12 telecom. The ITU is a specialized agency of the U.N.	09:06:27	12 licensing?
09:03:51	13 Q And since you identified it, the IEEE, what	09:06:32	13 A At IBM my organization was part of the
09:03:53	14 is that?	09:06:40	14 intellectual property and licensing function at
09:03:54	15 A That's the Institute of Electrical and	09:06:43	15 corporate headquarters. We came under that
09:03:57	16 Electronic Engineers. It's a professional association	09:06:45	16 organization, and so we interacted with the licensing
09:04:03	17 of more than I guess close to 500,000 engineers in	09:06:56	17 representatives, with the patent attorneys. My only
09:04:09	18 related fields throughout the world. One of their	09:07:02	18 direct activity would be when I was asked to provide
09:04:14	19 many activities is standards development through the	09:07:07	19 comments or positions in connection with the licensing
09:04:17	20 IEEE-SA, which SA is standards association. That	09:07:13	20 activities that they were engaged in because there was
09:04:27	21 develops and promulgates IEEE standards.	09:07:17	21 a standards related matter, but I was not involved in
09:04:31	22 Q And the IEEE standard that is at issue in	09:07:24	22 conducting any licensing negotiations per se.
09:04:35	23 this case is what, to your understanding?	09:07:30	23 While I sat in on a few meetings from time
09:04:36	24 A 802.11, which is a local area network	09:07:33	24 to time because of a potential standards related
09:04:40	25 standard.	09:07:36	25 issue, I was not personally more my people personally
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09:04:43	1 Q And you summarized, I think, some of your	09:07:42	1 involved in being responsible for licensing
09:04:51	2 relevant experience in your report, correct?	09:07:45	2 negotiations.
09:04:53	3 A Yes.	09:07:45	3 Q Okay. So you're not claiming any expertise
09:04:54	4 Q And that's accurate as far as you know,	09:07:48	4 in terms of licensing negotiations?
09:04:56	5 right?	09:07:50	5 A No. I have, certainly because of the
09:04:56	6 A Yes, it is.	09:07:53	6 organization, familiarity with the practice, the
09:04:57	7 Q Okay. You are not a lawyer, are you?	09:07:57	7 procedures, and what's entailed, but do not have any
09:04:59	8 A No, I'm not. I've been accused of lawyering	09:08:03	8 direct experience.
09:05:03	9 a number of times, but, no, I'm not a lawyer.	09:08:07	9 Q Okay. And that would include general patent
09:05:05	10 Q Okay. But you're not claiming any expertise	09:08:09	10 licensing outside of the standards context too?
09:05:08	11 regarding legal obligations, are you?	09:08:13	11 A Yes.
09:05:10	12 A No, I'm not.	09:08:13	12 Q All right. And as long as we're talking
09:05:10	13 Q Okay. And, as I understand it, you haven't	09:08:16	13 about the standard context here, there's a term that
09:05:13	14 provided any opinions about legal obligations?	09:08:20	14 we'll be using RAND, and it's your understanding that
09:05:15	15 A No, I have not.	09:08:23	15 that means reasonable and nondiscriminatory?
09:05:18	16 Q And in that regard, it's my understanding	09:08:26	16 A Reasonable and nondiscriminatory terms and
09:05:21	17 from your report that you have not claimed any	09:08:31	17 conditions, RAND.
09:05:23	18 expertise concerning the legal effect of the standard	09:08:32	18 Q Okay.
09:05:28	19 setting organizations policies; is that correct?	09:08:32	19 A Often also referred to as FRAND because of
09:05:30	20 A That is correct.	09:08:36	20 the European context, but basically fair, reasonable
09:05:36	21 Q And you're not claiming any expertise	09:08:40	21 and nondiscriminatory, the terms are pretty much used
09:05:39	22 regarding the legal effect of the Letters of	09:08:47	22 interchangeably.
09:05:41	23 Assurances, are you?	09:08:48	23 Q And I take it from your prior testimony that
09:05:42	24 A No, I'm not.	09:08:50	24 you have never personally participated in the
09:05:42	25 Q And you're not providing any opinions	09:08:53	25 negotiation of a patent licensing on RAND terms?

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09:08:57	1	A Correct.	09:12:58	1	organizations?
09:08:58	2	Q Have you ever been directly involved in	09:12:59	2	A No research. I have knowledge based on
09:09:02	3	negotiating any type of license?	09:13:03	3	reading documents and expert reports and testimony in
09:09:06	4	A No.	09:13:10	4	terms of what has been said, but that's knowledge I've
09:09:10	5	Q And so you are not providing any opinions	09:13:13	5	gained from that experience, not from doing any
09:09:12	6	about licensing per se, are you?	09:13:18	6	research.
09:09:13	7	A No. My opinions are in relationship to the	09:13:32	7	Q You are not providing an opinion on what a
09:09:17	8	SSOs. They are patent policies and related activities	09:13:34	8	reasonable royalty rate is for this case, are you?
09:09:23	9	only.	09:13:39	9	A No, I'm not.
09:09:23	10	Q And you have no previous personal experience	09:13:40	10	Q Okay. And you're not providing an opinion
09:09:32	11	in evaluating what would be a reasonable royalty rate?	09:13:42	11	concerning what any particular RAND term for a license
09:09:35	12	A No.	09:13:44	12	is in connection with this case?
09:09:37	13	Q Have you had any personal experience	09:13:46	13	A No, I'm not.
09:09:40	14	evaluating any RAND term in a license before?	09:13:52	14	Q I think we already established that this
09:09:47	15	A Yes.	09:13:54	15	case involves two standards, correct?
09:09:47	16	Q And what would that be?	09:13:56	16	A Yes.
09:09:48	17	A Reciprocity, terms of grant-backs.	09:13:57	17	Q The H.264 standard and the 802.11 standard?
09:09:55	18	Q And in what context did you evaluate that?	09:14:02	18	A Yes.
09:10:02	19	A I was the chair of the ITU-T ad hoc group	09:14:03	19	Q Okay. And I think you said that your
09:10:06	20	that developed their first statement. In fact, I was	09:14:16	20	opinions relate primarily to the patent policies of
09:10:12	21	looking in my footnote to give the right name of that	09:14:20	21	the two standards setting organizations at issue?
09:10:20	22	document patent licensing guideline. I wanted to give	09:14:24	22	A That's correct, yes.
09:10:27	23	the -- this is conveniently --	09:14:25	23	Q And the patent policies of standards setting
09:10:29	24	MR. RIZZOLO: It's page 8.	09:14:32	24	organizations govern the conduct of the persons or
09:10:31	25	THE WITNESS: -- referred to as the LOA,	09:14:38	25	companies who are participating in those
Page 15			Page 17		
09:10:34	1	Patent Statement and Licensing Declaration, okay, is	09:14:39	1	organizations, correct?
09:10:38	2	what the ITU calls it, and I chaired the ad hoc that	09:14:40	2	A Yes.
09:10:44	3	developed the first version of that, and one of the	09:15:11	3	Q One of the things that the patent policies
09:10:47	4	considerations was whether or not a reciprocal	09:15:12	4	of the IEEE and ITU provide for is the submission of a
09:10:57	5	grant-back should be included in that statement, and	09:15:16	5	Letter of Assurance in connection with essential
09:10:59	6	actually, that's a RAND term in the pure sense. So	09:15:19	6	patents that are identified during the standard
09:11:08	7	that's why I said I was involved in that.	09:15:21	7	process?
09:11:10	8	BY MR. WYLAND:	09:15:22	8	A Yes, it does.
09:11:10	9	Q And what did you conclude in that process?	09:15:26	9	Q And it's my understanding from your report
09:11:12	10	A The group concluded that there would be a	09:15:30	10	that neither the IEEE nor the ITU take any position on
09:11:17	11	requirement for a grant-back, and in the same way when	09:15:39	11	what is considered RAND in terms of terms for a
09:11:24	12	I was chairman of the IEEE patent committee, we had	09:15:42	12	license; is that correct?
09:11:29	13	some discussions on the matter and also that RAND term	09:15:44	13	A Correct.
09:11:35	14	was included.	09:15:47	14	Q And neither of those define what is
09:11:48	15	Q Have you been involved in any -- or did you	09:15:50	15	reasonable?
09:11:55	16	have personal involvement with evaluating any other	09:15:50	16	A Correct.
09:11:58	17	RAND terms for contracts or licenses I should say?	09:15:57	17	Q And neither of those SSOs define what is
09:12:02	18	A Any other RAND terms? No.	09:16:00	18	considered nondiscriminatory, do they?
09:12:18	19	Q Have you done anything for your testimony	09:16:02	19	A Correct.
09:12:35	20	today to educate yourself about reasonable royalty	09:16:03	20	Q So would you agree that the definition of
09:12:37	21	rates in the standards setting organization context?	09:16:05	21	what is or is not RAND, for purposes of a license,
09:12:43	22	A No, I have not.	09:16:13	22	under the patent policies of the IEEE and ITU is
09:12:47	23	Q Have you performed any independent research	09:16:16	23	outside the scope of the IEEE and I -- ITU's patent
09:12:49	24	concerning RAND terms in standards -- in licenses	09:16:22	24	policies?
09:12:56	25	covering essential patents for standards setting	09:16:22	25	A Yes. It's left to the parties involved to

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09:16:27	1 determine the RAND conditions.	09:21:18	1 Q And in terms of what your opinions are, do
09:16:32	2 Q And the IEEE and ITU patent policies don't	09:21:21	2 the differences among those different forms that
09:16:37	3 say anything about what factors may assist, say, a	09:21:23	3 Motorola has signed make any difference to the
09:16:41	4 court in determining what a reasonable royalty rate	09:21:28	4 opinions that you've given in this case?
09:16:43	5 is?	09:21:30	5 A No. The basic B, C, and D are the -- what
09:16:44	6 A Correct.	09:21:37	6 is included in the sentence in B, in C, and D are the
09:16:53	7 Q In terms of what other terms in a license	09:21:42	7 basic policy of the IEEE. The other items were not
09:16:56	8 might be considered RAND, the patent policies of the	09:21:52	8 there in previous versions.
09:17:05	9 IEEE and ITU do not provide any assistance to, say, a	09:21:54	9 Q Okay. And is it your understanding, at
09:17:09	10 court in determining what would be considered RAND?	09:21:59	10 least on all of the Letter of Assurance forms that you
09:17:12	11 A That's correct.	09:22:02	11 have seen for -- for Motorola in connection with the
09:17:20	12 Q Would you say it's fair to characterize what	09:22:06	12 IEEE, that they have elected -- they've taken this B
09:17:24	13 the IEEE and ITU have done is to say that they have	09:22:11	13 election under the Letter of Assurance?
09:17:33	14 purposely stayed completely out of the negotiations of	09:22:13	14 A Yes, a willingness to grant licenses under
09:17:36	15 parties of what a RAND license would be?	09:22:16	15 RAND, RAND terms and conditions, yes.
09:17:38	16 A Yes. In fact, the ITU explicitly says	09:22:23	16 Q All right. And by the terms of the Letter
09:17:44	17 negotiations are conducted outside of the ITU, and the	09:22:25	17 of Assurance here, the license granted has to be under
09:17:51	18 same is the intent of the IEEE.	09:22:28	18 reasonable rates, correct?
09:18:13	19 MR. WYLAND: Let's mark this.	09:22:29	19 A Yes.
09:18:14	20 (PX Deposition Exhibit 214 was marked	09:22:31	20 Q And it has to be to an unrestricted number
09:18:14	21 for identification and was attached to the deposition	09:22:34	21 of applicants?
09:18:26	22 transcript.)	09:22:35	22 A That's right. If anybody comes forward and
09:18:26	23 THE WITNESS: Thank you.	09:22:39	23 requests a license, they cannot be refused the
09:19:26	24 BY MR. WYLAND:	09:22:42	24 opportunity to negotiate for a license.
09:19:26	25 Q All right. You've been handed PX Exhibit	09:22:45	25 Q And it has to be on -- the license has to be
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09:19:33	1 214. Can you identify what this document is for me?	09:22:48	1 on a worldwide basis?
09:19:35	2 A It's a Letter of Assurance form for	09:23:02	2 A I would say generally yes, that's right.
09:19:37	3 essential patent claims from January 2008.	09:23:04	3 That's correct.
09:19:45	4 Q And is this form Letter of Assurance	09:23:05	4 Q And then finally it has to be with
09:19:47	5 something you relied upon in your -- in preparing your	09:23:07	5 reasonable terms and conditions that are demonstrably
09:19:51	6 report?	09:23:11	6 free of unfair discrimination, correct?
09:19:52	7 A Yes, it is.	09:23:14	7 A Correct.
09:20:07	8 Q All right. If you will look at under	09:23:15	8 Q Okay. And so does that mean that the terms
09:20:09	9 Section D, submitter's position regarding license of	09:23:18	9 and conditions other than royalties also must be
09:20:13	10 essential patent claims, and there's number 1, and	09:23:21	10 reasonable?
09:20:17	11 underneath that on the second page is B with a box	09:23:26	11 A Yes.
09:20:22	12 next to it. And B states, "The Submitter will grant a	09:23:28	12 Q And it has to be demonstrably free of unfair
09:20:30	13 license under reasonable rates to an unrestricted	09:23:33	13 discrimination?
09:20:34	14 number of applicants on a worldwide basis with	09:23:33	14 A Yes. I've always had difficulty with that
09:20:38	15 reasonable terms and conditions that are demonstrably	09:23:36	15 term, frankly, because I'm not sure what fair
09:20:44	16 free of unfair discrimination."	09:23:39	16 discrimination is. So free of unfair discrimination
09:20:46	17 Is that correct?	09:23:42	17 sort of implies, if you had fair discrimination it
09:20:46	18 A Yes.	09:23:45	18 would be okay but --
09:20:49	19 Q And this is the Letter of Assurance election	09:23:49	19 Q So I take it that you're not -- you're not
09:20:57	20 that relates to Motorola's 802.11 standard essential	09:23:51	20 quite sure what unfair discrimination means in that
09:21:05	21 patents; is that correct?	09:23:53	21 context?
09:21:06	22 A A form of this letter, yes. There have been	09:23:54	22 A Yes, I am sure. Based on my experience and
09:21:09	23 a number of versions of this over the years.	09:23:58	23 being involved in this for many years, the unfair
09:21:12	24 Q Okay.	09:24:00	24 discrimination means that, as we already said, you
09:21:12	25 A This I believe may be the most current.	09:24:10	25 will be willing to grant licenses to whomever may

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09:24:13	1	desire one, and it does not necessarily mean that you	09:28:16	1	A Yes.
09:24:21	2	show discrimination because different licenses have	09:28:17	2	Q And, again, as with -- as you discussed with
09:24:27	3	different royalty rates.	09:28:22	3	respect to the IEEE, Motorola signed a version, or
09:24:28	4	Some people interpret unfair discrimination	09:28:33	4	probably several versions of this form, correct?
09:24:31	5	to mean that every license has the same royalty rate,	09:28:35	5	A Yes.
09:24:39	6	otherwise it's unfair discrimination, which is not an	09:28:35	6	Q But, to your understanding, its obligations
09:24:43	7	opinion that -- that I would share based on my	09:28:38	7	are the same under all of those forms, right?
09:24:44	8	background and experience.	09:28:40	8	A Yes.
09:24:45	9	Q The IEEE does not define what unfair	09:28:45	9	Q And by the terms of this Letter of
09:24:53	10	discrimination means, though, does it?	09:28:50	10	Assurance, it says that the patent holder is prepared
09:24:55	11	A No, it does not.	09:28:52	11	to grant a license to an unrestricted number of
09:24:56	12	Q And when you talk about your experience, you	09:28:56	12	applicants, right, and that means the same thing that
09:24:59	13	haven't had any experience negotiating any RAND	09:28:58	13	we discussed with respect to the IEEE form?
09:25:04	14	licenses, right?	09:29:04	14	A Yes.
09:25:04	15	A No. But I've had experience in issues that	09:29:06	15	Q And, again, this one says it's on a
09:25:07	16	have brought -- been brought before, say, the Patent	09:29:08	16	worldwide basis, so -- so the scope of the license
09:25:09	17	Committee at the IEEE concerning terms and conditions	09:29:12	17	would have to be worldwide?
09:25:13	18	that patent holders were prepared to offer relative to	09:29:13	18	A Yes.
09:25:17	19	their licenses.	09:29:20	19	Q And, again, this Letter of Assurance
09:25:41	20	Q Let's look at the ITU's form.	09:29:22	20	specifies that the license should be
09:25:51	21	(PX Deposition Exhibit 215 was marked	09:29:24	21	nondiscriminatory?
09:25:51	22	for identification and was attached to the deposition	09:29:25	22	A Yes, it does.
09:26:20	23	transcript.)	09:29:26	23	Q And the ITU also does not define what
09:26:20	24	BY MR. WYLAND:	09:29:28	24	nondiscriminatory means, correct?
09:26:21	25	Q All right. You've been handed PX Exhibit	09:29:30	25	A Correct.
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09:26:25	1	215, and will you identify this document for me?	09:29:30	1	Q And it must be on reasonable terms and
09:26:27	2	A It's a copy of the patent statement	09:29:32	2	conditions, right?
09:26:31	3	licensing declaration that would be used for both	09:29:33	3	A Yes.
09:26:34	4	ITU-T and ITU-R recommendations. In the ITU the	09:29:33	4	Q And the ITU does not define what reasonable
09:26:41	5	standards are referred to as recommendations.	09:29:36	5	terms and conditions mean?
09:26:51	6	Q All right. And this is also a form Letter	09:29:42	6	A Generally, no, but in -- both in this
09:26:54	7	of Assurance that you relied on in preparing your	09:29:47	7	document and also the IEEE document, you had asked me
09:26:58	8	report?	09:29:53	8	about the SSOs, including any RAND terms and
09:26:58	9	A Yes.	09:30:04	9	conditions in their policies, and while these
09:27:04	10	Q And let's look at the -- again, the	09:30:07	10	documents are not, quote, the policy, one could say
09:27:06	11	licensing declaration language. I'll focus your	09:30:19	11	there is a RAND condition included if you select Item
09:27:10	12	attention. This is the second page under 2. This	09:30:22	12	1 free of charge, and you're basically saying that you
09:27:19	13	says, "The Patent Holder is prepared to grant a	09:30:26	13	are not going to charge a royalty rate.
09:27:21	14	license to an unrestricted number of applicants on a	09:30:30	14	So it does provide a condition where it
09:27:24	15	worldwide, non-discriminatory basis and on reasonable	09:30:37	15	includes, as an option, a RAND condition, and -- and
09:27:29	16	terms and conditions to make, use and sell	09:30:42	16	the same with the IEEE. It has a similar provision
09:27:35	17	implementations of the above document." Then it goes	09:30:48	17	which one could say is a RAND term which is I'm not
09:27:43	18	on to say, "Negotiations are left to the parties	09:30:53	18	going to charge, you know, a royalty. The IEEE
09:27:46	19	concerned and are performed outside the ITU-T, ITU-R,	09:31:00	19	document even under the item B grant includes two
09:27:51	20	ISO, or IEC;" is that correct?	09:31:07	20	options which are -- generally result from the ex ante
09:27:55	21	A Yes.	09:31:15	21	process which allows, on an optional basis, if the
09:27:55	22	Q Okay. And to your understanding, this is	09:31:20	22	patent holder wishes to choose to put a rates will not
09:28:06	23	the Letter of Assurance election that relates to	09:31:27	23	exceed provision, percent of product, flat fee, per
09:28:11	24	Motorola's H.264 standard essential patents; is that	09:31:30	24	unit, or sample license.
09:28:16	25	correct?	09:31:32	25	So those are, as it says, optional. They're

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09:31:36	1	not part of the policy, but they are guidance that is	09:33:55	1	taking no positions with respect to the reasonableness
09:31:40	2	recognized if one wishes to -- to take advantage of	09:33:58	2	of any terms that the patent holder provides under
09:31:44	3	it.	09:34:03	3	those options, correct?
09:31:44	4	Q Okay. You were looking at, for the last	09:34:07	4	A That's correct.
09:31:47	5	part of your question, on the IEEE, you were looking	09:34:32	5	Q And if we go back to PX Exhibit 215, which
09:31:50	6	back to PX Exhibit 214, correct?	09:34:36	6	is the ITU form of the Letter of Assurance, I think
09:31:53	7	A Yes, I was.	09:34:39	7	you've mentioned this before, but that -- that second
09:31:54	8	Q And so I take it from what you just told me,	09:34:43	8	sentence about negotiations are left to the parties --
09:31:57	9	you could consider in the option 1 where the patent	09:34:48	9	A Yes.
09:32:01	10	holder declares that they are going to -- or prepared	09:34:48	10	Q -- okay, and that is what you were relying
09:32:05	11	to grant a license free of charge, that the free of	09:34:53	11	on when you indicated that the ITU is essentially
09:32:07	12	charge term could be considered a RAND term, right?	09:34:56	12	staying out of the parties' negotiations, right?
09:32:10	13	A Yes, in the purest sense --	09:34:58	13	A Yes, and the same thing is true of the IEEE.
09:32:12	14	Q Okay.	09:36:02	14	MR. WYLAND: Let's mark a couple of other
09:32:13	15	A -- you could consider that a RAND term.	09:36:05	15	exhibits. Oh, wrong one.
09:32:15	16	Q Yeah. And so then if we look at Exhibit	09:36:16	16	Let's mark these two as the next ones.
09:32:20	17	214, the latter part of your statement was relating to	09:36:19	17	(PX Deposition Exhibits 216 and 217
09:32:22	18	options under B. There are two additional boxes	09:36:19	18	were marked for identification and were attached to
09:32:25	19	there, right?	09:36:38	19	the deposition transcript.)
09:32:25	20	A Yes.	09:36:38	20	THE WITNESS: Thank you.
09:32:25	21	Q And that now allows a patent holder to	09:36:54	21	MR. RIZZOLO: Counsel, do you have a copy
09:32:30	22	either declare a specific rate that they will not	09:36:55	22	for me?
09:32:33	23	exceed under the first box, right?	09:36:56	23	MR. WYLAND: Oh, I'm sorry.
09:32:34	24	A Yes, and it says for example, percent of a	09:36:57	24	MR. RIZZOLO: No problem.
09:32:38	25	product price, a flat fee, a per -unit fee, and I	09:36:58	25	MR. WYLAND: I do have copies. All right.
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09:32:43	1	guess you could say et cetera, but it gives some	09:37:00	1	I think this is -- was the first one Exhibit 215?
09:32:45	2	examples.	09:37:08	2	THE WITNESS: Standards association was
09:32:45	3	Q Sure. And then the second one is they can	09:37:10	3	Exhibit 216.
09:32:48	4	provide a sample license, right?	09:37:11	4	MR. WYLAND: Okay. That's Exhibit 216.
09:32:49	5	A Yes.	09:37:15	5	THE WITNESS: ITU is Exhibit 217.
09:32:50	6	Q Which would obviously contain more terms	09:37:18	6	MR. RIZZOLO: Thanks.
09:32:52	7	than just the royalty?	09:37:35	7	BY MR. WYLAND:
09:32:53	8	A Yes.	09:37:35	8	Q You have been handed Plaintiff's Exhibits
09:32:54	9	Q Okay. Now, if we look at the first page of	09:37:40	9	216 and 217, and let's just first establish what these
09:32:56	10	Exhibit 214, under Section D there's some italicized	09:37:44	10	are. PX Exhibit 216 is the patent policy for the
09:33:06	11	text in the note there, right, or that's titled	09:37:50	11	IEEE; is that correct?
09:33:12	12	"Note"?	09:37:51	12	A It's the section out of the standards board
09:33:13	13	A Yes, there is.	09:37:56	13	bylaws on patents, yes, Section 6.
09:33:13	14	Q All right. And here in the second sentence	09:37:59	14	Q Okay. Would you have a preference to look
09:33:20	15	it says, the IEEE takes no position with respect to	09:38:04	15	at the bylaws in total as opposed --
09:33:24	16	the validity or essentiality of patent claims or the	09:38:06	16	A No.
09:33:28	17	reasonableness of rates, terms, and conditions	09:38:06	17	Q -- to this, or does it --
09:33:31	18	provided in connection with submission of a Letter of	09:38:09	18	A This is fine. This is where the patent
09:33:35	19	Assurance, if any, or in any License Agreements	09:38:11	19	policy is contained.
09:33:37	20	offered by the submitter.	09:38:11	20	Q Okay. And PX Exhibit 217 is the common
09:33:39	21	Do you see that sentence?	09:38:16	21	patent policy for the ITU-T, ITU-R, ISO, and IEC?
09:33:40	22	A Yes, I do.	09:38:22	22	A Yes, that's correct.
09:33:44	23	Q Okay. So here even though they have those	09:38:23	23	Q Okay. And this is the -- in case it wasn't
09:33:47	24	two options under -- under 2 to provide a not to	09:38:27	24	clear from the title, this is the patent policy for
09:33:50	25	exceed royalty or provide a license, the IEEE is still	09:38:29	25	the ITU-T, correct?

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09:38:31	1	A Yes.	09:43:07	1	activities would have to be someplace other than the
09:38:31	2	Q Okay. Now it's -- as I understand it, in	09:43:09	2	SSO.
09:38:40	3	your report it's your opinion that the patent policies	09:43:09	3	Q And outside of -- yeah, sorry. Strike that.
09:38:44	4	only require the patent holder to be willing to	09:43:17	4	So I take it that you're -- in terms of the
09:38:47	5	negotiate a license in good faith; is that correct?	09:43:23	5	IEEE, you're not aware of any statement that the IEEE
09:38:51	6	A Yes, to enter into good faith negotiations	09:43:30	6	has made that says that a patent holder fulfills its
09:39:00	7	to any applicants who are interested in obtaining a	09:43:33	7	obligations under an accepted letter of assurance by
09:39:04	8	license.	09:43:40	8	only negotiating?
09:39:04	9	Q And can you point me to what in particular	09:43:41	9	A No, I do not believe there is such a
09:39:07	10	in the patent policies you base that opinion on?	09:43:43	10	statement.
09:39:14	11	A The --	09:43:50	11	Q And are you aware of any statement by the
09:39:15	12	Q And just so we're clear, when you're	09:43:53	12	ITU that says that a patent holder fulfills its
09:39:17	13	pointing to a document, could you tell us which one?	09:43:56	13	obligations under an accepted Letter of Assurance by
09:39:20	14	A Right.	09:44:00	14	only negotiating?
09:39:20	15	Q Sorry.	09:44:01	15	A The concern I have with your question is the
09:39:22	16	A The -- the good faith language per se is --	09:44:03	16	use of the word "only." Certainly, both policies
09:39:31	17	is not contained in the policy itself in either the	09:44:13	17	specify and include in their wording the fact that the
09:39:41	18	IEEE or the ITU, and the term has been used for many	09:44:18	18	patent holder who makes the RAND declaration is
09:39:50	19	years, by myself and others involved in standards, to	09:44:23	19	willing to offer licenses, and so that's the extent of
09:39:58	20	indicate that the patent holder who has made -- given	09:44:30	20	the statement from the SSO. It doesn't include any
09:40:04	21	the RAND assurance, okay, will engage in negotiations	09:44:38	21	statement relevant to only or not only.
09:40:14	22	for the intent of coming up with a RAND license using	09:44:57	22	Q Now, you said that -- and we can look at it.
09:40:30	23	good basic principles of negotiation with the other	09:44:59	23	Let's look at PX Exhibit 217, which is the patent
09:40:33	24	party to try to reach an agreement on a license. And	09:45:03	24	policy for the ITU-T, correct?
09:40:41	25	so that's basically where that comes from.	09:45:10	25	I think you mentioned that this in -- in the
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09:40:46	1	Since negotiations are left outside of the	09:45:15	1	Section 2 does use the word "negotiate," correct?
09:40:52	2	IEEE and the ITU, I believe that's why you will not	09:45:23	2	A Exhibit 217, right?
09:40:57	3	see any great amount of specific language relating to	09:45:28	3	Q Exhibit 217, yeah.
09:41:03	4	the activity itself.	09:45:29	4	A I thought you said Exhibit 216.
09:41:10	5	Q Okay. Following up on that last point, so	09:45:31	5	Q I'm sorry if I did. So Exhibit 217 is
09:41:15	6	I've -- I've read the IEEE patent policy, which is	09:45:33	6	the -- is the patent policy governing the ITU-T,
09:41:19	7	Exhibit 216, and I couldn't find the word "negotiate"	09:45:37	7	right?
09:41:21	8	or its derivatives in the policy itself.	09:45:37	8	A Yes, it is. They call it a code of
09:41:24	9	A That's correct. Unlike the ITU-T, but, as I	09:45:40	9	practice, but referred to it as the patent policy,
09:41:31	10	say, the -- the policy of the ITU-T even before they	09:45:42	10	yes.
09:41:38	11	were merged, the ISO and the IEC -- the ISO and IEC	09:45:42	11	Q Okay. Yeah.
09:41:48	12	are separate organization, ISO, International	09:45:44	12	A And 2.1 --
09:41:52	13	Organization for Standardization, and the IEC, the	09:45:46	13	Q Yeah.
09:41:58	14	International Electrotechnical Commission, are two	09:45:46	14	A -- such negotiations are left to the parties
09:42:05	15	separate international standards bodies. Before there	09:45:50	15	concerned and are performed outside the ITU-T,
09:42:09	16	was a common policy, they each had their own patent	09:45:53	16	correct.
09:42:18	17	policy, and those of us who were involved in standards	09:45:54	17	Q Yes. All right. Let's look at this common
09:42:26	18	and patent-related activities, basically, there was a	09:45:57	18	patent policy, and I think you just mentioned that
09:42:28	19	common understanding of the intent and of the	09:45:59	19	they refer to it as a code of practice, and that's
09:42:33	20	practices involved.	09:46:02	20	stated in the first line, correct?
09:42:37	21	The ITU-T was the one that most specifically	09:46:04	21	A Yes.
09:42:41	22	mentioned negotiations outside of the ITU-T, but when	09:46:04	22	Q All right. And then if you look at the
09:42:50	23	you read the patent policy of the IEEE and, as you	09:46:10	23	second paragraph, it starts recommended -- I'm
09:42:58	24	pointed out, the italics, that they take no position,	09:46:12	24	sorry -- recommendations/deliverables, and what are
09:43:05	25	I think there's a pretty clear indication that those	09:46:18	25	recommendations and deliverables?

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09:46:21	1 A If a recommendation -- which is the ITU's	09:49:11	1 non-binding; their objective is to ensure
09:46:27	2 title for a standard, in IEEE it would be called a	09:49:14	2 compatibility of technologies and systems on a
09:46:35	3 standard. In the ITU it's called a recommendation.	09:49:17	3 worldwide basis. To meet this objective, which is in
09:46:39	4 Slash, that's not really a slash, but slash	09:49:21	4 the common interests of all those participating, it
09:46:42	5 deliverable. It may be a preferred practice or	09:49:24	5 must be ensured that recommendations, their
09:46:50	6 something that doesn't carry the title of standard.	09:49:27	6 applications," uses -- I'm sorry -- "use, et cetera,
09:46:53	7 That's why they use the term "deliverable."	09:49:32	7 are accessible to everybody."
09:46:55	8 Q Okay. Let's look up above, where they --	09:49:34	8 Did I read that correctly?
09:47:00	9 they talk about recommendations are and deliverables.	09:49:36	9 A Without undue constraints.
09:47:03	10 It says, in the first paragraph in the parenthetical,	09:49:40	10 Q I'm sorry. I left something out. Oh, I was
09:47:07	11 "For purposes of this document, ITU-T and ITU-R	09:49:51	11 reading the second paragraph, not the third paragraph.
09:47:11	12 Recommendations are referred to as 'recommendations',"	09:49:54	12 A Okay. Let me -- yes.
09:47:14	13 correct?	09:50:02	13 Q Let's -- okay.
09:47:15	14 A Yes.	09:50:05	14 A The next paragraph --
09:47:15	15 Q So ITU-T and ITU-R recommendations are, as	09:50:06	15 Q Yeah, we'll talk about that in just a sec.
09:47:19	16 you said, those are the standard, right?	09:50:14	16 A Yes, that's what it says.
09:47:23	17 A Yes.	09:50:15	17 Q Okay. So then -- then we'll go to the next
09:47:23	18 Q So the H.264 standard is a recommendation?	09:50:17	18 paragraph, right? And that paragraph says, again
09:47:26	19 A Yes.	09:50:23	19 taking out the word "deliverables" because we'll be
09:47:27	20 Q And then it says that ISO deliverables and	09:50:26	20 discussing about ITU, "It follows, therefore, that a
09:47:30	21 IEC deliverables are referred to as deliverables. So	09:50:29	21 patent embodied fully or partly in a Recommendation...
09:47:33	22 is the -- is the ISO and IEC terms for standards, they	09:50:35	22 must be accessible to everybody without undue
09:47:39	23 call them deliverables?	09:50:38	23 constraints. To meet this requirement in general is
09:47:40	24 A I don't, but it appears they now do.	09:50:44	24 the sole objective of the code of practice. The
09:47:48	25 Q Okay.	09:50:52	25 detailed arrangements arising from patents (licensing,
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09:47:49	1 A At some point they've changed the	09:50:57	1 royalties, etc.) are left to the parties concerned, as
09:47:51	2 terminology to deliverables. I do not know why, but	09:51:04	2 these arrangements might differ from case to case;" is
09:47:55	3 they are standards. The ITU-T and R may have	09:51:08	3 that correct?
09:48:02	4 deliverables, but in this context it does appear that	09:51:08	4 A Yes, that's what it says.
09:48:07	5 the initial cap D on deliverables is referring to ISO	09:51:20	5 Q So the first sentence of the -- the third
09:48:14	6 and IEC, which based on my experience, are the	09:51:23	6 paragraph where it says that recommendations must be
09:48:18	7 standards developed by those organizations.	09:51:26	7 accessible to everybody without undue constraints, so
09:48:24	8 Q And so because this is a common patent	09:51:35	8 under the policy, any patent that is fully or partly
09:48:27	9 policy for four different organizations, two of which	09:51:38	9 embodied in a recommendation such as H.264, the policy
09:48:31	10 use one term "recommendations," two of which use	09:51:42	10 is saying that that must be accessible to everybody
09:48:36	11 deliverables, they -- in the patent policy they use	09:51:47	11 without undue constraint, right?
09:48:38	12 both, right?	09:51:49	12 A Yes.
09:48:38	13 A Yes.	09:51:50	13 Q Okay. And then the next sentence says, "To
09:48:39	14 Q And so where we see recommendations, and I	09:51:54	14 meet this requirement in general is the sole objective
09:48:43	15 used it -- I said slash, which you're right, it's not	09:51:57	15 of the code of practice." And so that means that the
09:48:45	16 really a slash. It's a straight up and down bar	09:52:01	16 sole objective of the policy is to meet the
09:48:48	17 deliverables. To me this means that if we're	09:52:03	17 requirements that patents embodied fully or partly in
09:48:52	18 referring to this in terms of the ITU, we use the term	09:52:10	18 a recommendation must be accessible to everybody
09:48:56	19 "recommendations," right?	09:52:12	19 without undue constraints, right?
09:48:58	20 A Yes.	09:52:14	20 A Yes, which is why the policy 2.1 says that
09:48:58	21 Q That's the operative term in the sentence?	09:52:17	21 the patent holder is willing to negotiate licenses
09:49:02	22 A Yes, it is.	09:52:21	22 with other parties on a nondiscriminatory and
09:49:04	23 Q Yeah, okay. So if -- if we -- if we use	09:52:24	23 reasonable basis, which is what makes them available
09:49:06	24 that and we take out the word "deliverables," that	09:52:27	24 to everyone without undue constraints.
09:49:09	25 second paragraph would read, "Recommendations...are	09:52:30	25 Q Okay. And then the preface to those

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09:52:32	1	numbered paragraphs says, "This code of practice may	09:55:14	1	Q -- correct? And the information referred to
09:52:35	2	be summarized as follows," right?	09:55:17	2	in paragraph 1 there is a disclosure that a
09:52:39	3	A Yes.	09:55:23	3	participating party would make if they have knowledge
09:52:39	4	Q So -- so these three paragraphs summarize	09:55:26	4	of a patent that either -- that either -- that either
09:52:41	5	what is the patent policy of the ITU-T, right?	09:55:32	5	does or may impact a standard under development,
09:52:43	6	A I'm sorry. Could you repeat that?	09:55:35	6	right?
09:52:45	7	Q I'm sorry. So these three numbered	09:55:35	7	A Yes.
09:52:46	8	paragraphs 1, 2, 3 here are essentially summarizing or	09:55:37	8	Q And so then it goes on to say that there are
09:52:52	9	setting forth the patent policy of the ITU?	09:55:41	9	three different situations might arise when a
09:52:58	10	A Actually, I think the -- the whole document	09:55:43	10	disclosure is made, right?
09:53:01	11	sets forth the Code of Practice even though after the	09:55:45	11	A Yes.
09:53:07	12	first three paragraphs it says the practice may be	09:55:46	12	Q And the first situation is that the patent
09:53:13	13	summarized as follows. I believe the whole document	09:55:48	13	holder is willing to negotiation -- negotiate a
09:53:17	14	covers the Code of Practice. I don't think it's just	09:55:50	14	license free of charge, and it goes on, right?
09:53:20	15	the first three paragraphs.	09:55:53	15	A Correct.
09:53:22	16	Q Fair enough. Let's look at the three	09:55:57	16	Q So that -- that's the situation that --
09:53:28	17	numbered paragraphs, though. The first paragraph,	09:55:58	17	that -- well, strike that.
09:53:30	18	this sets forth the disclosure requirement, correct?	09:55:59	18	The second is that the patent holder is
09:53:42	19	A Yes.	09:56:03	19	willing to negotiate licenses with other parties on a
09:53:44	20	Q And to summarize it, it's essentially saying	09:56:08	20	nondiscriminatory basis on reasonable terms and
09:53:47	21	that any party participating in the work developing a	09:56:11	21	conditions, right?
09:53:50	22	standard should disclose any patents that are known to	09:56:12	22	A Correct.
09:54:00	23	affect the standard?	09:56:12	23	Q And the third situation that might arise is
09:54:01	24	A Generally, yes, that's what it says.	09:56:15	24	that the patent holder is not willing to comply with
09:54:03	25	Q Yeah. And if you look at the second	09:56:18	25	either paragraphs 2.1 or 2.2, right?
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09:54:13	1	paragraph here, this is the paragraph that in your	09:56:22	1	A Yes.
09:54:18	2	report you've based your opinions about obligations to	09:56:28	2	Q So paragraph 2 here does not address the
09:54:21	3	negotiate, right?	09:56:30	3	Letter of Assurance issue, does it?
09:54:21	4	A Correct.	09:56:34	4	A I'm sorry?
09:54:27	5	Q And this paragraph is identifying three	09:56:35	5	MR. RIZZOLO: Objection, vague.
09:54:30	6	different situations that might arise when a	09:56:36	6	BY MR. WYLAND:
09:54:34	7	disclosure is made pursuant to the first paragraph; is	09:56:37	7	Q Okay. Paragraph 2 here by its terms does
09:54:37	8	that right?	09:56:42	8	not discuss the Letter of Assurance requirement,
09:54:37	9	A Yes, it does.	09:56:47	9	right?
09:54:42	10	Q And --	09:56:48	10	A In the case of the ITU, you mean the Patent
09:54:43	11	A Actually, it doesn't describe three	09:56:52	11	Statement and Licensing Declaration, right?
09:54:45	12	different.	09:56:53	12	Q Yes. Yes.
09:54:47	13	Q It doesn't describe three different, what do	09:56:55	13	A No, there's no mention of it here.
09:54:52	14	you mean by that?	09:56:57	14	Q Okay. Paragraph 3, however, does relate to
09:54:53	15	A Yes, yes, yes, it does. It describes three	09:57:03	15	the -- what we're calling the Letter of Assurance for
09:54:55	16	different -- three different possibilities for the	09:57:05	16	a patent declaration and licensing statement, right?
09:54:58	17	patent holder. I'm sorry.	09:57:09	17	A Yes, it does.
09:54:59	18	Q Okay.	09:57:10	18	Q So paragraph 3 says, whatever case applies,
09:55:00	19	A Yes.	09:57:14	19	2.1, 2.2, or 2.3 -- and that's referring back to what
09:55:00	20	Q So -- so the first sentence reads, again	09:57:19	20	we just discussed in paragraph 2, right?
09:55:03	21	taking out the word "deliverable," "If a	09:57:22	21	A Yes.
09:55:05	22	recommendation...is developed and such information as	09:57:22	22	Q Okay. It then goes on to say, "The patent
09:55:08	23	referred to in paragraph 1 has been disclosed, three	09:57:25	23	holder has to provide a written statement to be filed
09:55:12	24	different situations may arise:" --	09:57:28	24	at the ITU-TSB, ITU-BR, or the offices of the CEOs of
09:55:14	25	A Correct.	09:57:38	25	ISO or IEC, respectively." That -- that's referring

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09:57:44	1 to -- well, let me continue.	10:08:12	1 THE VIDEOGRAPHER: We're back on the record.
09:57:47	2 It then goes on to say, using the	10:08:14	2 The time is 10:08 a.m.
09:57:50	3 appropriate 'Patent Statement and Licensing	10:08:17	3 BY MR. WYLAND:
09:57:52	4 Declaration' form." So this paragraph 3 in the first	10:08:17	4 Q Okay. Throughout your report you say, you
09:57:57	5 sentence is providing the requirement that a party who	10:08:29	5 give your opinion that RAND terms and conditions are
09:58:05	6 has been identified as having a patent that does or	10:08:33	6 determined through bilateral negotiations, correct?
09:58:07	7 may impact a standard under development is required to	10:08:35	7 A Yes.
09:58:13	8 file a Patent Statement and Licensing Declaration	10:08:35	8 Q Okay. There's nothing in the SSO policies
09:58:16	9 form, right?	10:08:39	9 that prohibits multilateral negotiations, is there?
09:58:17	10 A Correct.	10:08:43	10 A No, there is not.
09:58:28	11 Q And then it says, "This statement must not	10:08:50	11 Q And, in fact, don't some SSOs encourage or
09:58:31	12 include additional provisions, conditions, or any	10:08:54	12 have encouraged the development of patent pools
09:58:34	13 other exclusion clauses in excess of what is provided	10:08:57	13 relating to licensing for standards?
09:58:38	14 for each case in the corresponding boxes of the form."	10:09:01	14 A I would say some have used patent pools,
09:58:41	15 And that means that a patent holder can't vary the	10:09:04	15 yes.
09:58:44	16 form when they turn it in, right?	10:09:06	16 Q And the SSOs don't take a position that
09:58:46	17 A Yes.	10:09:08	17 that's inappropriate, do they?
09:58:46	18 Q They can't change the language that has been	10:09:09	18 A No.
09:58:49	19 developed for use in the Patent Statement and	10:09:15	19 Q And there's nothing in the standards setting
09:58:55	20 Licensing Declaration form, right?	10:09:17	20 organization policies that prohibits ex ante
09:58:56	21 A Correct.	10:09:20	21 negotiations, is there?
09:59:04	22 Q And the language on the -- no, strike that.	10:09:26	22 A Nothing that prohibits. IEEE has that
09:59:28	23 And you agree that the patent holder's RAND	10:09:35	23 possibility. Some organizations do; some don't.
09:59:31	24 obligation stems from the Letters of Assurance that	10:09:41	24 Q And is it fair to say that -- that since the
09:59:36	25 are submitted to the SSOs, right?	10:09:48	25 SSOs through their policies stay out of the
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09:59:38	1 A Correct.	10:09:51	1 negotiations among interested parties, that they don't
09:59:38	2 MR. RIZZOLO: Objection, vague.	10:09:56	2 take a position one way or the other that negotiations
09:59:44	3 BY MR. WYLAND:	10:10:00	3 have to follow any particular form or arrangement?
09:59:44	4 Q Well, to address the potential objection, if	10:10:06	4 A That's correct. Many different alternatives
09:59:47	5 you'll pull out your report, which is PX Exhibit 213.	10:10:08	5 could be used.
10:00:29	6 Paragraph 24.	10:10:50	6 Q Take a look at your report, paragraph 53.
10:00:31	7 A Okay.	10:10:53	7 This is Plaintiff's Exhibit 213. Here you give an
10:00:32	8 Q And here the second sentence you say, "The	10:11:19	8 opinion about what a reasonable royalty should be
10:00:36	9 RAND obligation stems from the Letters of Assurance	10:11:22	9 viewed in terms of, return on investment and other
10:00:38	10 that are submitted to SSOs in accordance with SSO	10:11:29	10 considerations --
10:00:43	11 patent policies and procedures," right?	10:11:30	11 A Yes.
10:00:45	12 A Correct.	10:11:30	12 Q -- is that correct? Your opinion there is
10:00:46	13 Q Okay. And that's your understanding?	10:11:34	13 not based upon any requirement of the standards
10:00:48	14 A Yes, it is.	10:11:38	14 setting organization patent policies or guidelines, is
10:01:02	15 Q And I should say if you need a break at any	10:11:41	15 it?
10:01:05	16 time --	10:11:41	16 A My opinion is based on my involvement with
10:01:05	17 A Yeah, it's from drinking all the water.	10:11:46	17 the policies and the implementation of the policies
10:01:07	18 Q Would you like a break?	10:11:48	18 through the SSOs, in terms of my comments about
10:01:08	19 A Is that all right.	10:11:55	19 balancing the interest of, in this 53, of patent
10:01:09	20 Q It's fine with me. I don't know how long	10:12:00	20 holders and implementers. I think often there's a
10:01:10	21 we've been going. An hour, yeah.	10:12:04	21 view that the RAND activity is primarily viewed as a
10:01:12	22 A An hour.	10:12:18	22 benefit to the potential licensee, and often the --
10:01:13	23 THE VIDEOGRAPHER: We're going off the	10:12:20	23 what's overlooked is that it's intended to be a
10:01:14	24 record. The time is now 10:01 a.m.	10:12:25	24 balance to the patent holder's interest as well so
10:01:17	25 (Recess.)	10:12:29	25 that the SSO, in terms of its primary goal, which is

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10:12:34	1 promulgation of the standard, they want to see the	10:15:48	1 about this that they did include a sentence, and that
10:12:39	2 standard implemented either in products or services	10:15:51	2 sentence could be viewed as a possible consideration
10:12:44	3 and recognize that to do that there needs to be a	10:15:55	3 in negotiations.
10:12:47	4 balance.	10:16:00	4 Q So given, though, that the ITU doesn't
10:12:47	5 So I think often the -- the view of	10:16:03	5 define what a reasonable royalty rate is and that
10:12:52	6 reasonableness is considered more from the licensee	10:16:07	6 they've expressly stated that they're going to stay
10:12:59	7 side and not so much from the reasonableness for the	10:16:10	7 out of parties' negotiations, anything that Dr. Lynde
10:13:04	8 patent holder, which is why I commented on the balance	10:16:17	8 said can't really directly conflict with the ITU
10:13:06	9 there.	10:16:20	9 policy, can it?
10:13:06	10 Q But the SSOs, as we've seen, have expressly	10:16:21	10 MR. RIZZOLO: Objection, form.
10:13:15	11 said that they don't give an opinion on what is	10:16:22	11 THE WITNESS: Well, no, I -- I would --
10:13:17	12 reasonable, right?	10:16:24	12 would not agree because the ITU, in those two -- in
10:13:18	13 A That's right.	10:16:30	13 that -- those two sentences -- actually, the last one,
10:13:19	14 Q And they stay out of the negotiation	10:16:37	14 it mentions detail arrangements. I'm referring to
10:13:23	15 process, correct?	10:16:40	15 Exhibit 217, the third paragraph. And it says,
10:13:23	16 A Yes, they do.	10:16:48	16 Detailed arrangements arising from patents," and it
10:13:24	17 Q So there's nothing from the SSO patent	10:16:51	17 mentions arrangements, licensing, royalties, et
10:13:28	18 policy perspective that says that any of these items	10:16:56	18 cetera, are left outside, and then it says, as you've
10:13:30	19 here that you have listed should be considered in	10:17:00	19 said, these might or, if you will, may differ from
10:13:34	20 terms of determining what a reasonable royalty is,	10:17:03	20 case to case.
10:13:36	21 correct?	10:17:11	21 So when I commented on Dr. Lynde's report,
10:13:38	22 A That's correct.	10:17:16	22 all right, which implied that the conditions for an
10:13:48	23 Q And in paragraph 55 on page 23, this	10:17:26	23 appropriate royalty rate as he did, okay, and
10:13:56	24 paragraph is -- provides some of your opinions	10:17:32	24 specifically applying that to RAND is I think not in
10:13:59	25 regarding Dr. Lynde's expert report, correct?	10:17:44	25 concert with this ITU statement.
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10:14:03	1 A Yes.	10:17:47	1 BY MR. WYLAND:
10:14:12	2 Q And in the second sentence I believe you	10:18:05	2 Q But you do agree that where the ITU
10:14:13	3 state, "This is in direct conflict with the ITU	10:18:07	3 expresses in its policy that the detail arrangements
10:14:17	4 policy, which expressly recognizes that RAND terms and	10:18:10	4 from the patents, licensing, royalties, et cetera, are
10:14:20	5 conditions will vary case by case depending on the	10:18:13	5 left to the parties concerned, I think we've already
10:14:24	6 unique circumstances of the parties."	10:18:17	6 established that means that the negotiations
10:14:27	7 A Yes.	10:18:18	7 themselves are outside the scope of the ITU, right?
10:14:27	8 Q But that's -- the ITU policy doesn't state	10:18:21	8 A Yes.
10:14:31	9 that conditions will vary case by case, does it?	10:18:26	9 Q And that the ITU policy doesn't require or
10:14:38	10 A It says these arrangements might differ from	10:18:28	10 prohibit any particular form of negotiation, does it?
10:14:42	11 case to case.	10:18:31	11 A That's correct.
10:14:42	12 Q Will is different than might, right?	10:19:11	12 Q And if we look at your paragraph 58, the
10:14:46	13 A Yes.	10:19:22	13 second sentence you say, "As described above, the SSOs
10:14:47	14 Q Okay. And in stating that they might	10:19:25	14 do not concern themselves with the particular terms
10:14:54	15 differ, the ITU is also expressly saying that they're	10:19:27	15 and conditions of a RAND license, nor do they
10:14:58	16 staying out of those negotiations, right?	10:19:30	16 prescribe or forbid any specific terms, royalty
10:15:01	17 A Yes. It's an interesting statement in that	10:19:34	17 format, or royalty base," correct?
10:15:08	18 while stating -- staying out of the negotiations, they	10:19:36	18 A Yes, correct.
10:15:11	19 do include a statement that one could view as a	10:19:37	19 Q Okay. And -- and that's essentially what we
10:15:16	20 comment on the negotiations. So neither of these	10:19:40	20 just talked about, that -- that neither the IEEE --
10:15:23	21 policies I would say is -- is perfect from the	10:19:46	21 A IEEE.
10:15:26	22 complete extent of what each organization may intend	10:19:47	22 Q -- IEEE --
10:15:32	23 because there is some carryover in a number of	10:19:49	23 A Yes.
10:15:35	24 different ways, and in the ITU this is an example of	10:19:49	24 Q -- or the ITU concerned themselves with the
10:15:40	25 where I think it's -- the ITU felt strongly enough	10:19:53	25 specific terms of negotiations or with the definition

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10:19:58	1 of what reasonable terms and conditions are, right?	10:23:59	1 A And given depositions.
10:20:01	2 A Correct.	10:24:01	2 Q Do you recall approximately how many reports
10:20:22	3 Q Now, in paragraphs 66 to 70 of your	10:24:03	3 you have given for the Motorola/Apple matters?
10:20:26	4 opinion -- of your report, you provide certain	10:24:09	4 A Two or three.
10:20:29	5 opinions regarding patent hold up; is that correct?	10:24:10	5 Q And how many depositions?
10:20:37	6 A Yes, I do.	10:24:11	6 A Two I believe.
10:20:38	7 Q There's nothing in the SSO policies that	10:24:19	7 Q And have you testified at a trial or hearing
10:20:40	8 discuss the concept of patent hold up, is there?	10:24:21	8 in the Motorola/Apple matter?
10:20:44	9 A Not in the policies, no.	10:24:22	9 A No, I have not.
10:20:52	10 Q And are you basing your opinions there on	10:24:36	10 Q And approximately how many other expert
10:20:54	11 any particular statements from the SSOs concerning	10:24:37	11 retentions have you had since 2006?
10:20:56	12 patent hold up?	10:24:50	12 A I don't have that information in front of
10:20:57	13 A I'm basing it on my opinions after having	10:24:51	13 me. I've done work for -- oh, how many you said.
10:21:03	14 read Microsoft's expert reports, and, as I said, that	10:24:54	14 Q Yeah.
10:21:16	15 the SSOs, while concerned about promulgation of the	10:24:54	15 A Maybe four or five.
10:21:20	16 standard, the term "patent hold up" is often used in	10:24:59	16 Q Okay. And it's my understanding that the
10:21:26	17 the context of the possibility of a patent holder	10:25:01	17 Apple/Motorola matters involved RAND issues, if we can
10:21:34	18 being unwilling to license an essential patent, which	10:25:05	18 just use that term generally.
10:21:39	19 would therefore hold up the standard from being	10:25:06	19 A Yes.
10:21:41	20 implemented. So it's a term that is often used in	10:25:07	20 Q Have other of your representations involved
10:21:49	21 discussion about standards and patents.	10:25:10	21 RAND issues?
10:21:51	22 Q But your opinions there are not drawn from	10:25:10	22 A Yes, they have.
10:21:59	23 the patent policies, per se; is that correct?	10:25:11	23 Q Okay. How many of those?
10:22:02	24 A No, drawn from my experience and the	10:25:16	24 A I would say all except a couple.
10:22:07	25 implementation of the patent policy, having been	10:25:23	25 Q Okay. In terms of the cases that you've
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10:22:12	1 chairman of the Patent Committee of IEEE-SA, having	10:25:25	1 worked on that have involved RAND issues, have you
10:22:18	2 been a member for the U.S. on the ad hoc ITU committee	10:25:28	2 always represented the patent holder?
10:22:24	3 for patent policy, and numerous other involvements in	10:25:30	3 A Yes, I have.
10:22:29	4 implementation of the patent policies, and that's	10:25:37	4 Q And have you ever testified in a case that a
10:22:32	5 where my opinions are formed.	10:25:39	5 patent holder has not complied fully with its
10:22:48	6 Q How are you being compensated for your work	10:25:43	6 obligations under the applicable patent policies of
10:22:50	7 on this matter?	10:25:46	7 the standards setting organization?
10:22:53	8 A I'm being compensated at my normal hourly	10:25:48	8 A Not for any of the activities I've been
10:22:57	9 rate of \$600 an hour.	10:25:50	9 involved in.
10:23:01	10 Q How many hours have you worked on this	10:25:54	10 MR. WYLAND: All right. Can we go off for a
10:23:03	11 matter for so far?	10:25:55	11 minute.
10:23:04	12 A I thought last night you might ask me that,	10:25:59	12 THE WITNESS: Sure.
10:23:07	13 and I'm -- I'm not quite sure. It's certainly less	10:25:59	13 THE VIDEOGRAPHER: We're going off the
10:23:10	14 than a hundred, maybe it's 50 or -- or less. I'm not	10:26:00	14 record. The time is 10:25 a.m.
10:23:16	15 quite sure. I haven't billed for this activity. I	10:26:03	15 (Recess.)
10:23:21	16 will in September.	10:30:56	16 THE VIDEOGRAPHER: We're back on the record.
10:23:25	17 Q Okay. When did you start working on this	10:30:57	17 Here marks the beginning of Videotape No. 2 in the
10:23:27	18 activity?	10:31:01	18 deposition of Richard Holleman. The time is now 10:31
10:23:27	19 A About 3 weeks ago. On this particular	10:31:06	19 a.m.
10:23:34	20 activity, about 3, 3, 4 weeks ago.	10:31:08	20 BY MR. WYLAND:
10:23:39	21 Q And how many other matters for Motorola have	10:31:09	21 Q I am done subject to any further questions I
10:23:42	22 you been employed as an expert?	10:31:11	22 might have if you have any redirect. No?
10:23:43	23 A ITC matter Motorola and Microsoft, and then	10:31:14	23 MR. RIZZOLO: No questions.
10:23:53	24 Motorola and Apple, which I've done reports for --	10:31:15	24 THE VIDEOGRAPHER: Here marks the end of
10:23:59	25 Q Do you recall --	10:31:17	25 Videotape No. 2 in the deposition of Richard Holleman.

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10:31:20 1 We're going off the record and the time is 10:31 a.m.
 10:31:23 2 (Signature having not been discussed,
 10:31:23 3 the deposition of Richard J. Holleman was concluded at
 10:31:48 4 10:31 a.m.)
 5 (The following Acknowledgement of
 6 Deponent Page is included in the event at the
 7 conclusion of Richard J. Holleman's deposition he
 8 elects to read and sign his deposition transcript.)
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1 CERTIFICATE OF SHORTHAND REPORTER-NOTARY PUBLIC
 2 I, Joan V. Cain, Court Reporter, the officer
 3 before whom the foregoing deposition was taken, do
 4 hereby certify that the foregoing transcript is a true
 5 and correct record of the testimony given; that said
 6 testimony was taken by me stenographically and
 7 thereafter reduced to typewriting under my direction
 8 and that I am neither counsel for, related to, nor
 9 employed by any of the parties to this case and have
 10 no interest, financial or otherwise, in its outcome.
 11 IN WITNESS WHEREOF, I have hereunto set my
 12 hand and affixed my notarial seal this 21st day of
 13 August 2012.
 14
 15 My commission expires:
 16 June 14, 2014
 17 _____
 18 NOTARY PUBLIC IN AND FOR THE
 19 DISTRICT OF COLUMBIA
 20
 21
 22
 23
 24
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